

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-5027

In The
UNITED STATES COURT OF APPEALS
For the Second Circuit

In the Matter of
CHILI HEIGHTS ASSOCIATES,
Debtor
CENTRAL TRUST COMPANY ROCHESTER N.Y.,

Appellant,

vs.

JEROME C. ROSENTHAL, LEONARD MORRIS,
ELIZABETH BAUER, JOSEPH FAZIO, LEONARD
ZACCAGLINO, and FRANK RIZZO,

Appellees

ON APPEAL FROM THE DECISION
AND ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF NEW YORK
BK-75-4635

BRIEF FOR APPELLEES

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FACTS

Six individuals comprising CHILI HEIGHTS ASSOCIATES, borrowed in excess of \$100,000.00 from Central Trust Co. of Rochester, New York in order to invest said money into the buildings and improvements under construction owned by Chili Heights Associates known as Chili Heights Apartments. At the time the loan was granted to them Central Trust was aware of the purpose of the loan, and that all borrowers were partners of Chili Heights Associates. All this money borrowed was invested into the partnership property. The money borrowed was by and for the partnership but the form of the notes were individual demand notes.

In a Stay Order of February 5, 1976, the U.S. District Court enjoined all persons from commencing or continuing any suits against the individual partners until an appeal could be heard on the Bankruptcy Judges order of January 29, 1976 modifying his order of January 5, 1976 which stayed all suits against Chili Heights Associates and guarantors. The issue on appeal was whether the modification by the Bankruptcy Judges order lifting the stay on suits against guarantors was in error. In an order of the U.S. District Court, dated April 26, 1976 the U.S. District Court reversed the Bankruptcy Courts order of January 29, 1976 and reinstated his stay order blocking suits against the guarantors, the individual partners of Chili Heights Associates.

Central Trust applied to the U.S. District Court for an order allowing them to proceed in the New York Supreme Court on March 1, 1976

with motions on demand notes, however the order issued stated that no judgment shall be entered against the individuals until issues raised in the application, by Central Trust, are determined by the U.S. District Court.

Thereafter, the U.S. District Court in an order dated May 10, 1976 vacated and nullified the Order granted on March 1, 1976, allowing Central Trust to proceed in New York Supreme Court, by then Central Trust had obtained judgments that were not entered.

Flying in the face of the U.S. District Court Order of May 10, 1976, Central Trust entered judgments and issued restraining orders upon the individual partners of Chili Heights Associates.

Upon an order to show cause an application was made to order the judgments entered by Central Trust vacated. An order of the U.S. District Court issued July 21, 1976 decreed that the judgments entered against the individual partners be vacated.

This appeal is taken by the appellants from the order of July 21, 1976.

QUESTIONS PRESENTED:

I. Was Central's entry of judgments against the individuals on May 13, 1976 prohibited by order of the U.S. District Court dated May 10, 1976?

II. Was the District Court correct nullifying Central's authority to proceed to judgments against the individual partners and enter the judgments they obtained?

ARGUMENT
POINT I

CENTRAL'S ENTRY OF JUDGMENTS AGAINST THE INDIVIDUALS ON MAY 13, 1976 WAS PROHIBITED BY ORDER OF THE U.S. DISTRICT COURT, DATED MAY 10, 1976.

The order of the U.S. District Court dated May 10, 1976 vacated and nullified the order of March 1, 1976 which allowed Central to proceed on demand notes of the individual partners of Chili Heights Associates.

Flying in the face of this order of May 10, 1976 Central Trust entered judgments and issued restraining orders upon the individuals.

In the U.S. District Courts order dated July 21, 1976, the Court stated:

"In contravention of the order of this Court dated May 10, 1976 vacating and nullifying the order of this Court dated March 1, 1976, Central Trust Company, Rochester, New York has entered judgments against the individual owners of Chili Heights Associates on the demand notes of the individual owners of Chili Heights."

This paragraph of the July 21st order clearly shows that Central had no right to enter the judgments.

POINT II

THE DISTRICT COURT WAS CORRECT IN NULLIFYING CENTRAL'S AUTHORITY TO PROCEED TO JUDGMENT AGAINST THE INDIVIDUAL PARTNERS AND ENTER THE JUDGMENTS THEY OBTAINED.

There is no question with regard to the stay authority granted to the U.S. Courts under Bankruptcy Rule 12-43 in order to allow a debtor

to rehabilitate their finances.

In the case at bar, the individual loans made by the individual partners were made expressly for the benefit of the partnership-debtor Chili Heights Associates.

The property of the debtor was perpetuated by these funds for which the debt exists.

The lenders knew this when they loaned the money to them.

The form of the loan although given individually was in reality a loan to the partnership.

Under New York Law, Partnership Law Sect. 54, Subdiv. 1 a charging order may be obtained by a judgment creditor of an individual partner against the partnership and the Court may appoint a receiver of a partner's share of the profits, and any other money coming to him in respect to the partnership.

Also, a Court may make any orders pertaining to forced dissolution, a foreclosure of the lien and a public sale of partnership assets to reach the surplus.

The U.S. District Court which nullified Central's authority to proceed to judgment and later vacated judgments realized that if these judgments were to stand, then the partnership would face actions, and executions directed to the debtor. If this were allowed then the debtor in possession would be impeded in the formulation of a plan of reorganization and the Court would be frustrated in their efforts to achieve a workable arrangement. Colonial Realty Ins. Co. vs. Martin 516 F2 154 (1 Cir. 1975)

CONCLUSION

THE ORDER OF THE U.S. DISTRICT COURT APPEALED FROM VACATING JUDG-

MENTS AGAINST THE INDIVIDUAL MEMBERS OF CHILI HEIGHTS ASSOCIATES, SHOULD BE AFFIRMED.

Respectfully submitted,

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October 12, 1976

Mr. A. Coleman
United States Court of Appeals
Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

RE: Chili Heights Associates
Docket No. 76-5027
Chapter XII BK-75-4635

Dear Sir:

Enclosed please find ten (10) copies of Appellees Brief in the above matter which is scheduled to be argued during the week of November 8, 1976.

I have served two (2) copies of the same brief on my adversary, Gary Amendola, this same day.

Very truly yours,

Morton Bornstein
Morton Bornstein

MB:ch
Enc./